

**STATE WATER RESOURCES CONTROL BOARD
BOARD MEETING SESSION – DIVISION OF WATER RIGHTS
APRIL 2, 2019**

ITEM 9

SUBJECT

CONSIDERATION OF A PROPOSED ORDER ISSUING A CEASE AND DESIST ORDER AND IMPOSING ADMINISTRATIVE CIVIL LIABILITY AGAINST G. SCOTT FAHEY AND SUGAR PINE SPRING WATER, LP FOR THE ALLEGED UNAUTHORIZED DIVERSION OF WATER FROM FOUR SPRINGS IN TUOLUMNE COUNTY, WHICH ARE DEADWOOD SPRING AND THREE UNNAMED SPRINGS (AKA SUGAR PINE SPRING, MARCO SPRING, AND POLO SPRING) THAT ARE TRIBUTARY TO UNNAMED STREAMS, THENCE RESPECTIVELY TO BASIN CREEK, COTTONWOOD CREEK, HULL CREEK, AND HULL CREEK, THENCE THE NORTH FORK OF THE TUOLUMNE RIVER (DEADWOOD SPRING ONLY) AND THE CLAVEY RIVER, THENCE THE TUOLUMNE RIVER.

DISCUSSION

On September 1, 2015, the Assistant Deputy Director for the Division of Water Rights (Division) issued a draft cease and desist order (CDO) and administrative civil liability (ACL) complaint to G. Scott Fahey and Sugar Pine Spring Water, LP (collectively, Fahey). By letter dated September 8, 2015, Fahey requested a hearing on the draft CDO and ACL complaint. On January 25 and 26, 2016, the State Water Board held a hearing to receive evidence relevant to determining whether to adopt, with or without revision, the draft CDO and ACL issued against Fahey.

The parties to the proceeding were a Division staff Prosecution Team, Fahey, the Modesto Irrigation District (MID), the Turlock Irrigation District (TID), and the City and County of San Francisco.

In the draft order, which is based on the evidence in the hearing record, the State Water Board:

- a. Concludes that Fahey unlawfully diverted water during a severe drought emergency in 2014 and 2015 when water was not available to serve his priority of right and threatens to do so in the future if similar hydrologic conditions prevail, which constitute a trespass against the State as defined by Water Code section 1052, subdivision (a);
- b. Concludes that Fahey diverted water in 2014 and 2015 in violation of his permit terms, which incorporate the December 12, 1992 water exchange agreement (Water Exchange Agreement) between Fahey, MID, and TID, by failing to provide same-year make-up water during the fully appropriated stream periods (FAS Periods) during those years and that Fahey threatens to do so in the future, which constitute a trespass against the State as defined by Water Code section 1052, subdivision (a);¹

¹ Fahey's permit term violation includes the full time period described in bullet (a) plus one additional day of violation, October 31, 2014.

- c. Adopts a cease and desist order that requires that Fahey: 1) cease and desist continued and threatened unauthorized diversion; 2) timely file annual reports with the Division of Water Rights documenting and substantiating his compliance with the bypass flow obligations specified in his permits; 3) provide restitution to MID and TID for his diversions during the FAS periods in 2014 and 2015; and 4) submit a Curtailment Operations Plan that describes measures sufficient to ensure that Fahey complies with his Water Exchange Agreement with MID and TID and does not divert adverse to downstream senior claimants during any period when water is unavailable to MID and TID; and
- d. Imposes administrative civil liability upon Fahey in the amount of \$215,000 for the unauthorized diversion of water subject to the State Water Board's enforcement authority. Of this amount, \$50,000 is due immediately. The remaining \$165,000 is suspended pending Fahey's timely and successful compliance with the requirements of the cease and desist order regarding restitution and the Curtailment Operations Plan.

POLICY ISSUE

Should the State Water Board adopt the proposed order?

FISCAL IMPACT

This activity is budgeted within existing resources and no additional fiscal demands will result from approval of this item.

REGIONAL BOARD IMPACT

Yes, approval of this order may require consultation with, and may require permits from, the Central Valley Regional Water Quality Control Board.

STAFF RECOMMENDATION

Staff recommends that the State Water Board adopt the proposed order.

State Water Board action on this item will assist the Water Boards in reaching Goal 6 of the Strategic Plan Update: 2008-2012 to enhance consistency across the Water Boards, on an ongoing basis, to ensure our processes are effective, efficient, and predictable, and to promote fair and equitable application of laws, regulations, policies, and procedures. In particular, approval of this item will assist in fulfilling Objective 6.1 to target consistency improvements in process and policy for Water Board enforcement activities to promote compliance.